INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE NEW YORK CENTRAL RAILROAD COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 381–385) is reported in 50 F. Supp. 497. The report of the Interstate Commerce Commission (R. 72–78) has not yet been published.

JURISDICTION

The final decree of the district court was entered on June 10, 1943 (R. 385). The petition

for appeal was filed and allowed on June 11, 1943 (R. 338, 391–392). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a) and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on June 21, 1943 (R. 400).

STATUTE INVOLVED

The relevant provisions of Part I of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 26–28.

QUESTIONS PRESENTED

The questions presented are:

1. Whether an order of the Interstate Commerce Commission authorizing the abandonment of a branch line of railroad was within the Commission's jurisdiction under Section 1 (18)–(20) of Part I of the Interstate Commerce Act, or whether it was beyond the Commission's authority on the ground that the line was a suburban or interurban electric railroad not operated as a part of a general steam railroad system of transportation and excluded by Section 1 (22) from the Commission's power over abandonments.

2. Whether the order is invalid on the ground that while the operation of the branch in question concededly resulted in a loss to the carrier, the

general operations from the system as a whole were profitable.

3. Whether the Commission exceeded its discretion in denying a petition for rehearing.

STATEMENT

On August 20, 1942, the New York Central Railroad Company filed an application (R. 10–30) with the Commission for a certificate of public convenience and necessity, under Section 1 (18) of Part I of the Interstate Commerce Act, which would authorize it to abandon a branch line extending 3.1 miles from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, N. Y. (R. 72).

A hearing was held upon the application, at which the Public Service Commission of the State of New York, the City of Yonkers, and a committee of Yonkers commuters appeared as protestants. The City of New York appeared in support of the application. (R. 176.) Brief were subsequently filed, and an examiner's proposed report was issued (R. 31–37), to which exceptions were filed by the protestants (R. 37–61), and the matter was orally argued before the Commission, Division 4 (R. 349–370). On March 20, 1943, the Commission, Division 4, issued its report finding that the present and future public convenience and necessity permit the abandonment (R. 71–78). With the report, it issued the order and certificate here challenged (R. 78–79).

The branch in question, known as the Yonkers branch, is part of the New York Central's Putnam Division, with which it connects at Van Cortlandt Park Junction, in Bronx County, New York City (R. 13, 72, 181, 332, 333, 348A). The Putnam Division connects with the Hudson Division, which is part of the main line from New York to Chicago (R. 181, 251). The Hudson Division proceeds north from Grand Central Station to the Harlem River, then veers west to the Hudson and follows the east bank of the Hudson through Yonkers to Albany. The Putnam Division extends north from Sedgwick Avenue Station, at Sedgwick Avenue and West 161st Street in New York City, through Yonkers to Brewster. The tracks of the Putnam and Hudson divisions are immediately adjacent between Sedgwick Avenue and West 191st Street. (R. 332, 348A.) Two stations along this stretch, High Bridge and University Heights, serve both divisions (R. 188). North of 191st Street, the Putnam Division is east of and roughly parallel with the Hudson Division. In the City of Yonkers, the two divisions are approximately one mile apart. The Yonkers branch is between the Hudson and Putnam divisions. It extends northwestwardly from Van Cortlandt Park Junction (a point in Van Cortlandt Park opposite West 250th St.) to Getty Square in Yonkers. Getty Square is 0.3 mile east of the Yonkers station on the Hudson Division. (R. 17, 19, 72, 73, 332, 348A.)

The New York Central system is for the most part operated by steam (R. 382–383). Some portions of its lines are electrified, including the Hudson Division between Grand Central Station and Harmon, N. Y., the Harlem Division as far as White Plains, N. Y., the Putnam Division between Sedgwick Avenue and Van Cortlandt Park Junction, and the Yonkers branch (R. 72, 77, 182, 186, 187, 351, 370B).

The Yonkers branch has not handled freight traffic in many years; no industries are dependent upon it for freight service (R. 72, 19–20, 208). It is operated exclusively for passenger traffic, principally commuter travel between the four stations on the branch in Yonkers—Getty Square, Park Hill, Lowerre, and Caryl—and Grand Central Station, New York City (R. 209, 382–383, 19, 72, 73). Because of the congested condition of the main-line tracks south of Mott Haven Junction at 149th Street, which must accommodate numerous suburban trains to points on both the Hudson and Harlem divisions, as well as through express trains, trains serving stations on the Yonkers branch do not proceed to Grand Central Station (R. 210, 250–252). They run from Getty Square to Van Cortlandt Park Junction, thence over the main line of the Putnam Division to the terminal at Sedgwick Avenue. Passengers from stations on the Yonkers branch to Grand Central Station must transfer to Hudson Division trains at either

High Bridge or University Heights stations. (R. 19, 72, 188, 348A.)

With the abandonment and dismantling of the branch, train operations between Getty Square and Sedgwick Avenue would be discontinued (R. 76). The electrical installations between Sedgwick Avenue and Van Cortlandt Park Junction would also be dismantled, but this part of the Putnam Division would not be otherwise disturbed, and steam operations on the Putnam Division would continue (R. 182).

Patronage on the branch has steadily diminished (R. 24). At present, the total volume of business, approximately 600 passengers in each direction daily, is only about 25 percent of that twelve years ago (R. 77, 205–206, 335). This decline in volume is reflected by the reduction in train service. In 1926, when the branch was electrified (R. 182), 71 trains were operated daily. Between then and 1938, because of the steady decline in patronage, the number of trains was reduced from time to time to 17 in each direction. (R. 72–73, 189.) It was anticipated that the change from steam to electric operation in 1926 would result in increased patronage, but instead there was a material decline (R. 182, 73).

As a result, operation of the branch has become unprofitable. The total revenues for the year 1940 were $49,603, as against expenses of operation of $106,632 (including $34,557 for taxes but nothing for overhead expenses), resulting in an

out-of-pocket loss of $54,889. The average loss for the years 1940–1941, as found in the Commission's report, was $56,941. (R. 75–76, 21–24, 198–205, 249.)

Abandonment of this branch would not affect regular passenger and freight service to and from Yonkers by the remaining lines of the New York Central, nor would it leave Yonkers without commutation service into New York City (R. 72–74, 383). The New York Central would continue to render its present commutation service from its four Hudson Division stations in Yonkers, namely, Ludlow, Yonkers, Glenwood and Greystone, and its present commutation service on its Putnam and Harlem divisions would also be continued. On the Putnam Division there are six stations within Yonkers: Lincoln, Dunwoodie, Bryn Mawr, Nepperhan, Gray Oaks, and Nepera Park. Just east of Yonkers there are five stations on the Harlem Division: Wakefield, Mt. Vernon, Fleetwood, Bronxville, and Tuckahoe. (R 17, 73; 181–182.) The Harlem Division extends northerly from the junction with the Hudson Division at E. 149th Street to a junction with the Putnam Division at Brewster, paralleling both the Putnam and Hudson Divisions. It skirts the city limits of Yonkers on the east. (R. 73, 348A.) The stations on the Yonkers branch are within 0.3 to 1 mile from the nearest stations on these other lines (R. 72, 348A).

Bus lines operate from points near the stations on the Yonkers branch to stations on the Hudson Division. The use of these buses in connection with frequent train service on the Hudson Division constitutes a feasible alternative route to Grand Central Station. There are other alternate routes to downtown New York, including a trolley line which operates from Getty Square along Broadway, passing close to the Park Hill, Lowerre and Caryl stations, to the Broadway subway at 242nd Street. (R. 73–74, 191–198, 228–238, 257–264.)

Upon these and other facts shown in the report, the Commission found "that the line in question is being operated at a substantial loss to the applicant, and that there is no prospect of more favorable results for the future. Continued operations would impose an undue and unnecessary burden upon the applicant and upon interstate commerce." (R. 78.)

Petitions for rehearing were filed by the protestants (R. 79–100), to which replies were submitted by the New York Central and the City of New York (R. 100–109). After consideration by the entire Commission, the petitions were denied (R. 110).

Suit to enjoin the order was filed shortly thereafter by the protestants (R. 1), and a hearing was held before a statutory three-judge court (R. 118). Of the various grounds of invalidity alleged in the complaint (R. 1–10), only three were urged in

the court below, *viz.*, that the Commission lacked jurisdiction because the branch was an interurban electric railway within the exemption of Section 1 (22); that the evidence was insufficient to support the conclusion that continued operation of the branch would constitute an undue burden on interstate commerce; and that there was a lack of a fair hearing because the Commission denied appellants' petitions for rehearing (R. 123–140).

On June 10, 1943, the court rendered its opinion (R. 381) finding the order to be valid and dismissing the bill. A direct appeal was taken to this Court. The Public Service Commission of the State of New York, one of the plaintiffs below (R. 380), did not join in the appeal. (R. 388.)

On June 11, 1943, the court below granted a temporary stay of the Commission's order only until application therefor could be made to this Court (R. 387–388). On June 16, 1943, Mr. Justice Jackson denied a stay, and this Court subsequently refused to stay the order. Service on the branch was discontinued on June 30, 1943.[1]

SUMMARY OF ARGUMENT

I

The court below held that the electric passenger line involved here was operated as part of an interstate general steam railroad system of trans-

[1] Presumably, the rails and other facilities have been preserved in place pending determination of this appeal. In any event, no question of mootness is presented.

portation, and its holding is amply supported by the evidence. Hence, this branch is not within the exemption of Section 1 (22) of the Interstate Commerce Act.

Under Section 1 (20), it was unnecessary for the New York Central Railroad to secure the approval of the State commission before abandoning the branch.

Expressions in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.,* 288 U. S. 1, relied upon by appellants, are inapplicable because those cases concern independently operated electric roads rather than roads operated as part of a general steam railroad system.

II

The validity of an order authorizing abandonment of an unprofitable branch does not depend upon whether the system operations are profitable as long as the branch operates at a substantial loss, thereby unduly burdening interstate commerce. *Colorado* v. *United States,* 271 U. S. 153; *Transit Commission* v. *United States;* 284 U. S. 360. Under the rule of these decisions, the Commission had regard for both intrastate and interstate commerce. It found that there were satisfactory alternate means of transportation, that the great decline in patronage of the branch resulted in operating the branch at a substantial

loss, that continued operation would impose an undue and unnecessary burden upon interstate commerce, and that the present and future public convenience and necessity permit the abandonment. These administrative findings were supported by substantial evidence and accordingly are not matters for "judicial redecision." *Purcell* v. *United States*, 315 U. S. 381, 385.

III

The denial by the entire Commission of the petitions for rehearing was clearly within the Commission's discretion. *United States* v. *Northern Pacific Ry.*, 288 U. S. 490. The additional evidence which appellants wished the Commission to consider at a rehearing was not of a sort to compel the Commission to grant a rehearing. *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U. S. 349, 389.

ARGUMENT

I

THE BRANCH LINE IS OPERATED AS A PART OF "A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION" AND IS NOT, THEREFORE, WITHIN THE EXEMPTION OF SECTION 1 (22) OF THE INTERSTATE COMMERCE ACT

Section 1 (18)–(20) of Part I of the Interstate Commerce Act confers authority upon the Commission to issue certificates of public convenience and necessity authorizing any carrier subject to the Act to abandon "all or any portion" of its line

of railroad. Section 1 (22) provides that the authority so conferred shall not extend to the abandonment of "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Appellants claim (Yonkers Br. 14–19; Tooley Br. 5–7) that the branch in question is an interurban electric railway, not operated as a part of a general steam railroad transportation system, and is, therefore, exempt from the Commission's jurisdiction under Section 1 (22). In the proceedings before the Commission, this question was neither presented *in limine* nor urged in the briefs, exceptions, or oral arguments. It was suggested for the first time, without supporting argument,

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No serious challenge (cf. Tooley Br. 8) of the Commission's authority is made by appellants on the ground that the branch in question lies wholly within the State and that there is no affirmative showing of the movement of interstate commerce over the branch. In *Colorado* v. *United States*, 271 U. S. 153, the Court overruled the contention of the State that the Commission lacked power to authorize the carrier, whose railroad system was located partly in Colorado and partly in other States, to abandon the operation, in intrastate commerce, of a part of its line lying wholly within Colorado. The Court, distinguishing *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, sustained the power of the Commission on the ground that losses from the operation of the branch cast an undue burden upon interstate commerce. That controlling factor is present in the instant case. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, 120, 123–124; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119; *United States* v. *Bailey*, 312 U. S. 100, 118; *Shreveport Rate Cases*, 234 U. S. 342.

in appellants' petitions to the Commission for reconsideration (R. 87, 96). The Commission's denial of the petitions indicates that it deemed the contention to be without merit. In the court below, this view was urged by appellants as their principal contention (R. 5, 124–130, 138). The court considered it in the light of the evidence in the Commission's record and certain evidence *de novo* received without objection (see R. 146, 168) on the part of defendants, since such a jurisdictional question may be determined by the reviewing court without prior administrative decision.[3] *United States* v. *Idaho*, 298 U. S. 105; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *Texas & Pac. Ry. Co.* v *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266.

The three-judge court held, in view of the terms of Section 1 (22), that if an electric passenger line is operated as part of a general steam railroad system of transportation, its abandonment is within the Commission's power; the court entertained no doubt that this branch was so operated (R. 382).

This holding is amply supported by the evidence, which established the following facts. The branch is operated, not as an independent carrier as in the *Piedmont & Northern* case, nor even by a subsidiary company, but directly by the New

[3] Although the point was not raised until after the issuance of the Commission's report, the findings of fact therein sufficiently indicate that the branch was operated as a part of the New York Central System (see R. 72, 76, 78).

York Central itself, as a branch line. It is not operated as a separate or detached segment, but in conjunction with other parts of the system. Constructed in 1888 by the New York & Northern Railway, it was operated under lease by the New York Central & Hudson River Railroad Company, predecessor of the New York Central Railroad Company, from 1894 to 1913, when it was merged with the lessee company. Since the formation of the New York Central Railroad Company in 1914, it has been operated by it as a part of its Putnam Division. (R. 13, 15.)

All trains operating on the branch also operate on that part of the Putnam Division between Van Cortlandt Park Junction and Sedgwick Avenue, and most of the passengers change to Hudson Division trains to complete their trips to Grand Central Station (R. 19, 73, 75, 76). All expenses of the operation of the branch are paid out of the general treasury, and the losses from the operation are borne by the New York Central (R. 20–24, 28–30, 199, 200–205). Tariffs of the New York Central provided for one-way, monthly-commutation and other tickets usable between stations on the branch and Grand Central Station (R. 344–345). Time tables of the New York Central publish schedules of service between Grand Central Station and stations not only on the Putnam Division between Sedgwick Avenue and Van Cortlandt Park but also on the Yonkers branch (R.

332–333). The operating results of the branch are reflected in the accounts of the New York Central (R. 21–24, 30, 76, 335).

Other facts shown by the evidence and found by the statutory court may be stated briefly. Operations on the Putnam Division, other than those between Sedgwick Avenue and Van Cortlandt Park Junction, are by steam (R. 382, 72, 351, 370B). The bulk of the traffic on the Yonkers branch transfers at High Bridge or University Heights to the New York Central's Hudson Division, where suburban trains run to and from the Grand Central Station on a through line whose ultimate end is Chicago (R. 382, 19, 75, 348A, 251). The suburban or intrastate trains on the Hudson Division are operated as part of the through steam railroad system to Chicago (R. 382–383, 251, 155, 156). So intimately connected is the Yonkers branch with the operation on the Hudson Division that seats must be provided on the Hudson Division trains for all the transferred Yonkers passengers for the short run from the end of the Yonkers branch to the Grand Central Station, whereas those same seats would be available for the Yonkers commuters at the Ludlow and Yonkers stations on the Hudson Division near the present terminus of the Yonkers Branch—the chief alternate means of transportation available for patrons of the Yonkers branch. In other words, the New York Central provided on the

Yonkers Branch service which was substantially duplicated for the passengers on its Hudson Division, concededly within the Commission's jurisdiction. (R. 383, 188–189, 159, 199.) The court further found that the Yonkers branch was in fact operated by the railroad as a part of its Putnam Division and its general system and that "The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the Branch, and other details of operation—all appear intertwined with the operation of the system as a whole" (R. 382, 155–156, 19, 224–225).

The branch is clearly "a portion" of a line of railroad subject to Part I of the Interstate Commerce Act within the meaning of Section 1 (18), and is thus one which could not lawfully be abandoned without a certificate[4] of public convenience and necessity issued by the Interstate Commerce Commission, in view of Section 1 (20) which provides in part:

> From and after issuance of such certificate, and not before, the carrier by railroad may,

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[4] The certificate here in question authorizes a complete abandonment of the Yonkers branch, involving dismantlement and salvaging, and not a mere curtailment or partial discontinuance of service under continued operation of the line. The latter situation has been held to be outside the purview of the abandonment provisions of Section 1 (18). *Proposed Abandonment, Morris & Essex Co.*, 175 I. C. C. 49; *Public Convenience Application of Kansas City Southern Ry.*, 94 I. C. C. 691. Cf. *Palmer* v. *Massachusetts*, 308 U. S. 79, 85.

> without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. * * *

The phrase "without securing approval other than such certificate" indicates that if the carrier is one engaged in interstate commerce and therefore "subject to this part" (sec. 1 (18)), as in this case, it need not obtain approval of the State commission or any other authority, and that the jurisdiction of the Interstate Commerce Commission in the premises is exclusive. *Colorado* v. *United States*, 271 U. S. 153, 168; *Transit Commission* v. *United States*, 284 U. S. 360; *Purcell* v. *United States*, 315 U. S. 381; cf. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, see 2 Sharfman, *The Interstate Commerce Commission* (1931), pp. 264–269.

There are no facts of record that lend support to appellants' contention that the Yonkers branch is operated separately or independently from other parts of the New York Central's system. Their reliance is upon certain expressions in cases such as *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, stressing electric interurban and suburban passenger service, among others, as significant factors to be considered. But cases such

as these involving the status of independently operated electric roads not operated as a part or parts of a general steam railway system of transportation are inapposite here.

As the branch is clearly operated as a part of the New York Central system, it is not within the exemption of Section 1 (22). The court below thus did not err in holding that the Commission had jurisdiction in the premises.

II

PROFITABLE SYSTEM OPERATIONS CONSTITUTE NO BAR TO THE ABANDONMENT OF AN UNPROFITABLE BRANCH

Appellants contend (Tooley Br. 8–9; Yonkers Br. 20–22; R. 390) that, under the circumstances presented, the estimated annual loss which the Commission found (R. 76) would result from continued operation of the Yonkers branch, $56,911, could not as a matter of law constitute an undue burden upon interstate commerce.

The contention implicitly assumes that though the branch in question lies wholly within a State, it is operated by an interstate carrier, and that the losses from its operation constitute a burden upon interstate commerce to the extent found by the Commission. This contention also assumes that if the operations of the carrier as a whole were unprofitable, this particular loss would constitute a burden *pro tanto* upon interstate com-

merce, which the Commission might find to be undue in view of the decision in *Colorado* v. *United States*, 271 U. S. 153.[5]

The argument is predicated upon the fact that the carrier's operations as a whole are profitable. It is true that at the present time the carrier's aggregate revenues are large,[6] due, no doubt, to the carriage of war traffic.[7] But the validity of an order authorizing abandonment of an unprofitable branch does not depend upon whether system operations as a whole yield either a profit or a loss. The purpose of the abandonment provisions is to enable interstate carriers to avoid losses from unprofitable lines, upon the authorization of the Commission and without the concurrence of State authorities. Adopted in 1920 and carried forward in the Transportation Act of 1940 (54 Stat. 898, 919), they sought, in conjunction with numerous

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[5] In that case, this Court sustained the power of the Commission to authorize abandonment, as to intrastate commerce, of a branch of an interstate carrier lying wholly within a State, on the ground that "control is exerted" by Section 1 (18)–(20) of the Interstate Commerce Act "over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens * * * found to result from operating a branch at a large loss" (271 U. S. 163).

[6] In 1939, the New York Central's net income was $4,509,236; in 1940, $11,265,084; and in 1941, $26,245,562; and for the first five months of 1942, $11,351,125. In 1938, the operations resulted in a deficit of $20,154,357. (R. 29.)

[7] Cf. *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 543, declining to assume that figures of war earnings could serve as a reliable criterion for the "indefinite future."

other provisions, to strengthen the national railway transportation system. *Texas* v. *United States*, 292 U. S. 522, 530–532, and cases cited; *United States* v. *Louisiana*, 290 U. S. 70, 73–75; *Transit Commission* v. *United States*, 289 U. S. 121, 127; *Colorado* v. *United States*, 271 U. S. 153, 162–165; see also *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277–278. As stated in *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42, the purpose of the construction and abandonment provisions is "to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." This purpose could not be fully accomplished if the abandonment provisions were restricted to carriers whose system operations as a whole are unprofitable. The provisions have not been so interpreted either by the Commission or by this Court. In the *Colorado* case, it was unsuccessfully contended (see 271 U. S. 166) by the State that the order authorizing abandonment was void, insofar as it related to intrastate commerce, because the Commission had failed to find, *inter alia*, that the company would be prevented from earning a fair return on the value of its properties as a whole. Speaking for the Court, Mr. Justice Brandeis observed that (271 U. S. 167–169) the sole test prescribed by the Act is that the abandonment be consistent with public convenience and necessity and that in determining

such a question, the Commission must have regard to the needs of both interstate and intrastate commerce.

In *Transit Commission* v. *United States*, 284 U. S. 360, 370, sustaining a certificate of the Commission authorizing the abandonment by the Long Island Railroad Company of a portion of its Whitestone branch, in which it was urged that the carrier's system as a whole had large earnings and was a successful enterprise, the Court, referring to the *Colorado* case, held that the carrier need not claim "that immediate abandonment of the local branch was necessary to enable the carrier to earn a reasonable return on its investment."

In the present case, the Commission had regard for the needs of both intrastate and interstate commerce. It found that there are several alternate means of transportation from Yonkers to New York City that are convenient and economical; that patronage of the branch has greatly declined with the result that the branch is now operated at a substantial loss; that there is no prospect of more favorable business in the future; that continued operation would impose an undue and unnecessary burden upon the carrier and upon interstate commerce;* and that the present

*The finding that the continued operation would impose an undue burden upon the carrier and upon interstate commerce is supported by detailed evidence showing the total receipts from the operation of the branch, the actual expense of its operation, and the taxes thereon, and showing that the expenses exceed the revenues by $56,941 annually (R. 76, 21-24; 201-205).

and future public convenience and necessity permit the abandonment (R. 73–75, 77, 78). These administrative findings, being supported by substantial evidence, are not matters for "judicial redecision." *Purcell* v. *United States*, 315 U. S. 381, 385; see also *Gray* v. *Powell*, 314 U. S. 402, 412, 413; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *United States* v. *Maher*, 307 U. S. 148, 154; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177.

As the court below said (R. 383):

> Simply because the Central was generally prosperous does not mean that the Commission could not authorize the abandonment of a losing branch; otherwise a railroad would stand committed to drains upon its income for costly and unnecessary service until complete bankruptcy intervened.

III

DENIAL OF THE PETITIONS FOR REHEARING WAS WITHIN THE COMMISSION'S DISCRETION

Appellants and another protestant before the Commission, subsequent to the report of Division 4, filed petitions for rehearing to present additional evidence showing, *inter alia*, that a New York subway would be extended to a connection with the elevated shuttle near 155th Street,[9] that

[9] This subject had been considered in the Commission's report (R. 77–78).

the cities of Yonkers[10] and New York would reduce tax assessments against the Yonkers branch, and that Governmental restrictions on the use of gasoline would cause curtailment of bus operations to local stations on the Hudson Division in Yonkers (R. 79–100). Replies opposing rehearing were filed by the New York Central and the City of New York (R. 100–109). Appellants claim (Tooley Br. 16; Yonkers Br. 11) that the Commission's denial of these petitions invalidates its order and violates the due process clause. The Commission may, of course, grant a rehearing, but in its judgment no sufficient reason was advanced for such action in this case.[11] Cf. *United States* v. *Northern Pacific Ry.*, 288 U. S. 490.[12]

The subway extension was one which the City of New York might construct after the end of the

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[10] *Idem.*

[11] In *Woodruff* v. *United States*, 40 F. Supp. 949, 953 (D. Conn.), a three-judge district court held that in a case of this kind the Commission is not required to grant any hearing to private parties. The court held that under the terms of Section 1 (19), in connection with Section 20a (6), the Commission is required to grant a hearing in abandonment proceedings only to the state authorities and the railroad. Cf. *Chicago Junction Case*, 264 U. S. 258, 265, note 10. It is unnecessary to decide this question here since the Commission accorded appellants a full and fair hearing.

[12] The present case bears no resemblance to *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, which appears to be the only case where this Court annulled an order of the Commission upon proof of a change in conditions so fundamental that the refusal to receive further evidence was tantamount to a denial of the full hearing required in such a case.

war. If constructed, it would afford a connection, via the elevated shuttle, between the New York Central's Sedgwick Avenue station and the New York subway system. The suggestion was that if this subway extension were built, there would be an increase of patronage on the Yonkers branch, thereby making the branch operation profitable. (R. 93–95, 358–360.) However, the City of New York was unable to give any assurance that this extension would ever be constructed (R. 108, 160, 358, 380). Moreover, patronage on the Yonkers branch steadily declined over a twelve-year period, notwithstanding the existence of a connection between the Sedgwick Avenue station and the 6th and 9th Avenue elevated lines, which were not dismantled until 1938 and 1940, respectively (R. 77, 205–206, 73).

The petitions for rehearing stated that the City of Yonkers would reduce its taxes on the Yonkers branch property in the amount of approximately $9,000 per annum (R. 86, 91, 95) and that the City of New York would make a reduction of $10,000 per annum in its taxes against the branch (R. 95). The aggregate tax paid by the carrier on the branch in 1941 was $34,557 (R. 76). Of this, $23,598 was assessed by the City of Yonkers and $10,959 by the City of New York (R. 109, 204). Counsel for the City of New York characterized the suggestion of a tax reduction of 90 percent from $10,959 to $1,000 as "mere wishful thinking" (R. 109; see also R. 161, 379). Even if the City of Yonkers granted a $9,000 reduction in taxes,

the loss from the operation of the branch would still be substantial. (See Statement, *supra*, pp 6-7).

Concerning the gasoline curtailment, the president of the local bus company testified that if the Office of Defense Transportation required him to reduce his service 15 percent, he would probably curtail the service during the non-rush hour periods (R. 263). The record further established that there are other alternate routes not dependent on bus transportation (R. 72–74, 383, 384, 348A).

Consequently, it is apparent that none of the claimed additional evidence was of a sort to compel the Commission to grant a rehearing. *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U. S. 349, 389.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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DECEMBER 1943.

APPENDIX

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (18) provides:

> (18) No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this Act, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. (49 U. S. C. 1 (18).)

Section 1 (19) provides:

> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (49 U. S. C. 1 (19).)

Section 1 (20) provides:

> (20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and

conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. (49 U. S. C. 1 (20).)

* * * * * *

Section 1 (22) provides:

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation. (49 U. S. C. 1 (22).)

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